United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2104

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BETTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LeVASSEUR,

Plaintiffs-Appellees,

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T.C. DAVIS and
THOMAS F. MILBANK,

Defendants-Appellees,

MICHAEL MOUMOUSIS and NAPOLEON C.
GABRIEL, JACOB R. COHEN and JUNE COHEN,

Objectants-Appellants

Appeals from Three Decisions
of the District Court

**BRIEF FOR PLAINTIFF-APPELLEE
ALLEGHANY CORPORATION**

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Preliminary Statement

Four separate appeals are being heard by this Court together. Two of the appeals, from the denial of separate motions to set aside or modify the Judgment approving settlement, were taken by Michael Moumousis and Napoleon Gabriel, respectively. The orders appealed from are dated December 7, 1973 and April 8, 1974, respectively.

The other two appeals are from an order dated July 3, 1974, fixing attorneys' fees. One of these fee appeals was also taken by Napoleon Gabriel, the other by Jacob and June Cohen.

Prior Proceedings

Facts

The facts are fully and accurately set forth in the opinions of the Honorable Edward Weinfeld, both on the approval of the settlement [59 F.R.D. 353 et seq., App.* 367 et seq.] and on the fee award [377 F. Supp. 926 et seq., App. 165]. Similarly, the Interstate Commerce Commission ("ICC"), which conducted five full trial days of hearings on the re-capitalization which formed part 2 of the settlement, has set forth the facts at length and dealt in great detail with those

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* All references to the Appendix are to the Joint Appendix of Appellees.

aspects of the recapitalization subject to its jurisdiction. Missouri Pacific Railroad Co., Securities, F.D. 27346, _____ ICC _____(Div. 3, 1973) [App. 420-501]. Finally, both the joint brief submitted by appellees Missouri Pacific R.R. ("MoPac") and Mississippi River Corporation ("Mississippi"), and the joint brief submitted by appellees Orans, Elsen & Polstein and Pomerantz Levy Haudek and Block, fully and accurately set forth the facts and properly state the questions presented. Pursuant to F.R.A.P. 28(i), we adopt those statements.

ARGUMENT

I

The Appeals from Denials of the Motions to Set Aside or Modify the Judgment Approving Settlement are Without Merit

A. The Gabriel Appeal

1. This Court has no jurisdiction to hear this appeal.

The Gabriel motion [App. 68-71], presumably brought under F.R.Civ.P. Rule 60(b),* was based on a claim [App. 70] that the settlement could not bind stockholders who owned less than $10,000 worth of the Class B securities, citing Zahn v. International Paper, 414 U.S. 291 (1973). A "Supplemental

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* The motion itself cites no rule or statute [App. 70-71].

Petition" [App. 72-74] claimed additional grounds which are not entirely clear but appear to assert lack of jurisdiction by the District Court to approve the settlement upon the grounds 1) that the settlement entailed a corporate re-capitalization, and 2) that Alleghany was prevented from being a "real party" in interest by virtue of the fact that its MoPac stock was subject to a trust. Judge Weinfeld's decision of April 8, 1974 denied the motion [App. 86] but the notice of appeal [App. 87-89] was not filed until June 17, 1974. This Court, therefore, has no jurisdiction to hear this appeal. Guido v. Ball, 367 F.2d 882 (2d Cir. 1966); 9 Moore's Federal Practice, ¶¶ 204.01[2], 204.02.

2. The Zahn Claim is Without Merit

a) The claim based on Zahn is foreclosed by prior adverse determinations.

Counsel for appellants Gabriel and Moumousis first raised this point (on behalf of a certain William Wesson, an objectant, whom he then represented) on January 10, 1974 in a petition for reconsideration of the denial of certiorari [App. 415, ¶ 1.]. He argued that Zahn, which was decided by the Supreme Court on December 17, 1973 (the same day certiorari was denied in this case), was a "Controlling Intervening Factor" [App. 409]. Zahn was apparently new to petitioners though it was merely an affirmance of a decision of this Court. 469 F.2d 1033 (2d Cir. 1972). Obviously, counsel had had ample

opportunity to raise the Zahn point before Judge Weinfeld in January 1973 or before this Court on the prior appeal.

Thus, so far as the Zahn argument is concerned, the Gabriel motion is nothing but an attempt to relitigate the Supreme Court's denial of Wesson's Petition for Rehearing on Petition for Certiorari [App. 419] which had been based on this same ground [App. 415, ¶1]. The ICC had also rejected the same argument [App. 513-14] made to that body in a petition for rehearing dated January 10, 1974. [App. 503-505].

b) The Zahn argument is baseless in law and fact.

Quite aside from the prior adjudications, the assertion that Zahn is applicable is utterly frivolous, as Zahn pertains only to F.R.Civ.P. Rule 23(b)(3) class actions. Judge van Pelt Bryan held Levin to be a class action under Rule 23(a), 23(b)(1) and 23(b)(2) on October 9, 1968. [App. 177-178]. The Zahn rule does not apply to such actions. Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), cert. den. 396 U.S. 1037 (1970).

Furthermore, Congress has mandated that claims under the Securities and Exchange Act of 1934 have no minimum jurisdictional amount [15 U.S.C.A. § 78aa]. Paragraph 48 of Alleghany's amended complaint specifically asserts a claim under that Act and Regulation 10(b) thereof [App. 197-201]. In attempting to avoid dismissal of this appeal on motion, counsel for appellant averred

> "Despite statements of the movants and the court below that jurisdiction of the said action was also based on the Securities Exchange Act of 1934, deponent after many careful reviews of all the pleadings and amended pleadings below can find no allegation of any plaintiff below which purported to base jurisdiction of the court below on the S.E.C. Act, all allegations of jurisdiction being solely based on diversity of citizenship of the parties." [App. 566]

Though appellant's brief indicates that appellant's counsel has now found the amended complaint, the original assertion is characteristic of the manner in which appellants have conducted this litigation.

The amended complaint is, of course, on file in this Court, and is printed in the Appendix herein [App. 179-201]. The 10(b) claim was specifically referred to in the settlement approval hearing before Judge Weinfeld [App. 280] and specifically referred to in Judge Weinfeld's opinion approving the settlement [59 FRD at 359; App. 373]; is specifically referred to in the Settlement Agreement [App. 203] which was annexed as Attachment C to the Proxy Statement, and is specifically referred to in the ICC decision [App. 426].

3. The claim that a settlement cannot comprehend a recapitalization is foreclosed by prior determinations in this case.

The argument that the settlement terms of a class action suit cannot include provision for a recapitalization of a defendant company was made by Mr. Gabriel's counsel (then representing objectant William Wesson) to this Court on the

prior appeal [App. 395-396]. This Court rejected the argument by an affirmance on the opinion below [App. 401]. Counsel again urged it in his petition for certiorari from this Court's affirmance of Judge Weinfeld's opinion and, again, on petition for rehearing of the denial of certiorari. [App. 415]. The point was once more unsuccessfully urged upon the ICC (See ICC decision [App. 462] and further discussion therein of the point [App. 484-485].) The point was again urged on petition for reconsideration of the ICC decision [App. 506]. This appeal thus constitutes the fifth attempt to litigate this issue.

4. There is no "newly discovered" evidence.

The last "substantive" point of Gabriel's motion, and the principal claim in the Moumousis motion, are based on the fact that an ICC order required Alleghany Corporation to trustee carrier securities, including its MoPac stock [App. 34]. Gabriel asserted that this fact prevented Alleghany from being a "real party in interest." In view of Alleghany's receipt of nearly 50,000,000 dollars in cash and securities in this re-capitalization, it is easy to see why the Moumousis-Gabriel brief does not pursue this argument on appeal. However, Moumousis' claim, that this trust was "newly discovered" evidence, is pursued. The truth is that this trust was (1) first ordered in an official report of the Interstate Commerce Commission in 1945, Chesapeake & Ohio Purchase, F.D. 14692; [App. 24], (2) repeatedly ordered and officially reported in ICC Decisions from

1945 to 1967 [See citations and quotations at App. 2527, and the orders themselves at App. 3037], and in a 1970 decision of the full Commission in Alleghany Corp. - Control and Purchase - Jones Motor, Inc., 109 MCC 333, 350 [See App. 48-50 for the Order pertaining thereto], (3) specifically brought to the attention of the Court in the hearing seeking approval of the settlement by direct statement [Tr. 27, App. 272] and by the appearance of record at that hearing of counsel for the Trustee [Tr. 6, App. 250], (4) specifically adverted to in the Court's opinion approving the settlement [59 FRD at 358, App. 372], (5) specifically referred to in the Settlement Agreement [App. 210] (which was annexed to the proxy statement [App. 515] as Exhibit C), and also (6) specifically referred to on page 2 of the proxy statement [App. 516], (7) referred to in the decision of the ICC approving the recapitalization of defendant MoPac [App. 480], and (8) specifically raised on motion for reconsideration of the ICC decision [App. 506] and rejected by the Commission [App. 513-514].

At the hearing on Mr. Gabriel's motion to modify the judgment approving settlement, his counsel did not even argue Points 3) and 4) above [App. 75-82], and when Mr. Haudek, who argued against the motion, mentioned the "Supplemental Petition," there followed two sentences of colloquy and the following interchange between the Court and counsel for Gabriel:

"THE COURT: Is that one that the court lacked judicatory power?

"MR. HAUDEK: That's right.

"MR. CAREY: Yes, Your Honor, I know that argument has been made before, but as a matter of record --

"THE COURT: That has all been presented previously.

"MR. CAREY: Before." [App. 84]

The Court's memorandum opinion discusses the Zahn point, even if disparagingly, but the other points are covered fully and completely in the first sentence; "This motion is without merit." [App. 86]

The Gabriel appeal of the denial of his motion to re-open is thus not only beyond the jurisdiction of this Court to hear and foreclosed by prior adverse determinations, but is utterly baseless in law and in fact.

B. The Moumousis Appeal

The Moumousis appeal from a denial of a motion to set aside the judgment approving settlement was timely noticed on January 1, 1974 (though obviously not diligently prosecuted), and asserts two claims: 1) that "new evidence" requires a re-opening and 2) that a different settlement should have been imposed. The first point is raised jointly with Mr. Gabriel, and is covered above.

The demand that a different settlement be imposed on the parties was made before Judge Weinfeld [App. 71-102, 112-115] and was rejected [59 F.R.D. at 372; App. 386]. It was

urged before the Supreme Court of the United States and again on petition for rehearing of the denial of certiorari [App. 415], and before the Interstate Commerce Commission at great length [App. 458-460]. Judge Weinfeld held simply that he would consider only the fairness of the plan proposed by the parties and would not "reopen [settlement] negotiations" [59 FRD at 372; App. 386]. The ICC, however, considered the proposal in detail [App. 459-460] and held

> "We have examined the alternate proposals presented by Class B stockholders -- one a stock split for Class B stock and the other a stock split plus the purchase of Alleghany's Class B stock by MoPac -- and find that they are neither justified nor practicable. In short, it would simply not be in the public interest to attempt to override the overwhelming majority vote of each class of stock, the policy-decision of MoPac, and the settlement agreement, in order to satisfy the wishes of a few dissident stockholders." [App. 486] (Emphasis added)

This point, also, was urged on petition for reconsideration of the ICC order [App. 511] and rejected [App. 513-514].

The Moumousis appeal is patently frivolous.

II

The Fee Appeals Are Without Merit

A. The Gabriel "Fee Appeal"

Only one point in the Gabriel-Moumousis brief relates to fees. That point makes two claims: 1) that the order to pay fees is based in part on services in a related, prior action, and 2) that the "fee" hearing was premature, in that no final

judgment existed. Appellee Alleghany made no claim for fees based upon services in any action but the instant one [App. 90-108; App. 169], so the first subpoint states no ground for appeal as to the $850,000 ordered to be reimbursed to Alleghany.

The second subpoint argues that the pendency of the appeals of the denials of motions to modify or set aside the judgment approving settlement, and the pendency of certain three-judge court actions attacking the ICC's approval of the re-capitalization, prevent the judgment approving the settlement from becoming "final." In view of the exhaustive settlement approval opinion by Judge Weinfeld, its affirmance by this Court, the denial of certiorari, the denial of reconsideration of the denial of certiorari, the approval by the ICC and finally the consummation of the recapitalization, this contention boggles the mind.

The motions to modify or set aside the judgment approving settlement, by express provision of law, do "not affect the finality of a judgment or suspend its operation." F.R.Civ.P., Rule 60(b). The attacks on the ICC order are not even of record, and there is nothing in appellant's appendix even to show that such actions have been brought -- typical of the cavalier attitude of appellants for the record. Furthermore, such

actions are not appeals, but original actions brought to review such a proceeding, and are confined exclusively to reviewing such decisions on the record before the Commission. 28 USC § 2321-25. See, e.g., Assigned Car Cases, 274 U.S. 564 (1927); Watson Bros. Transp. Co. v. United States, 59 F. Supp. 762 (D. Nebr. 1945).

The Gabriel fee appeal is thus meritless on the "finality" argument and does not state any ground whatsoever for an appeal of the award to Alleghany.

B. The Cohen Fee Appeal

The Cohen appeal is directed solely to the fee award, and is primarily an objection to any part of the fees being paid by defendant appellee MoPac. The ten points into which this brief is divided assert no complaint as to the fees ordered reimbursed to appellee Alleghany.

The Cohens raised this same objection to any payment of fees by MoPac at the original settlement hearing [App. 244].

Judge Weinfeld expressly denied this contention [[illegible] F.R.D. at 373; App. 387]. The Cohens failed to appeal. The judgment has long since become final and this point cannot now be raised upon appeal of the fee award. Indeed, the ICC expressly held that this settlement and the recapitalization "contained numerous benefits to MoPac." [App. 479]

Other points in the Cohens' appeal complain of payments for services in related actions and payments allocable

to derivative counts in the complaints. As shown, appellee Alleghany made no claim for expenses or services in any action other than the instant action. [App. 90-108] Similarly, Alleghany's complaint and amended complaint asserted no derivative claims [App. 179-201]. Consequently, none of the Cohens' points states any ground for appeal as to the award to Alleghany.

Since the Cohens do not object to the amount to be paid to appellee Alleghany, neither the filing of the appeal nor the disposition of it can affect Alleghany's right to the fee awarded, and it is self-evident that Alleghany was improperly named as an appellee.

III

ALLEGHANY IS ENTITLED TO DOUBLE COSTS AND DAMAGES

The statutes and rules permit the recovery of double costs and damages where appropriate.

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." [28 USC, § 1912]
>
> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." [F.R. App. P. Rule 38]

A. The Cohen Fee Appeal

Nothing in this appeal pertains to the fee awarded to Alleghany Corporation, yet Alleghany Corporation was named

an appellee, preventing, thereby, under the Settlement Agreement, payment of this portion of said award. For this abuse of process, Alleghany respectfully requests double costs against appellant Cohen.

B. The Moumousis and Gabriel Appeals

The Gabriel appeal contains five points, all either irrelevant or baseless. All of the points pertaining to the merits have been raised before, some of them as many as eight times.

The Moumousis claim of newly discovered evidence as to a matter which had been officially reported twenty years previously, and which had been specifically adverted to in Judge Weinfeld's opinion approving settlement, is so outrageous as to suggest that counsel could not have made it in good faith.

The appellees have been subjected to a succession of frivolous appeals and motions. After the original hearing, the same counsel has appeared in each stage of the litigation representing a series of holders of a few shares of stock. Neither Alleghany nor any other party has previously assessed costs or requested additional relief against any of the objectors/appellants, though appellees were clearly entitled to costs after appellants' last cycle through this Court. We,

therefore, respectfully submit that this case falls precisely within the rubric of Oscar Gruss & Son v. Lumbermen's Mutual Casualty Co., 422 F.2d 1278 at 1284 (2d Cir. 1970), wherein this Court said:

> "In view of the superfluity of issues on appeal, the frivolity of almost all of them, and the briefing of many in a manner that simply ignored the abundant evidence supporting the determination of the jury and the judge, we exercise our discretion under the statute and rule as follows: Gruss is awarded an additional four per cent interest on the judgment appealed from, double costs on Lumbermen's appeal, and $7,500 in attorney's fees."

On this authority, Appellee Alleghany respectfully prays an award of double costs on the Cohen appeal and, against appellants Moumousis and Gabriel jointly, an award of double costs, damages of six percent of the fee award of $850,000 since the date of the award (July 2, 1974) and $7,500 in attorneys' fees on their three frivolous appeals.

Respectfully submitted,

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Thomas J. Cerna, being duly sworn, deposes and says that he is over the age of 18 years and not a party to this action. On October 23, 1974 he caused 2 copies of the annexed brief to be served upon Gerard M. Carey, Esq.; William Heimowitz, Esq.; Dewey Ballantine Bushby Palmer & Wood; Sullivan & Cromwell; Orans, Elsen & Polstein; and Pomerantz, Levy, Haudek & Block by personal delivery at their offices designated for service in this action; and upon Michael Paul Cohen, Esq., by mailing to his offices at 7319 N. Oakley, Chicago, Illinois.

Thomas J. Cerna

Sworn to before me this
23rd day of October, 1974.

Notary Public

HUGH F. PETTIT
Notary Public, State of New York
No. 41-3081100
Qualified in Queens County
Cert. filed in New York County
Commission Expires March 30, 1975